

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
MICROBAND CORPORATION OF)	File No. 20010402AEM
AMERICA)	
)	
For Renewal of License of Multipoint)	
Distribution Service Station WPY39,)	
Portland, Oregon)	
)	
and)	
)	
AMERICAN TELECASTING OF)	File No. 20000104AAG
PORTLAND, INC.)	
)	
For a New Multipoint Distribution Service)	
Station on Channel 1 at Portland, Oregon)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 2004

Released: November 1, 2004

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we address a Petition to Deny¹ filed by American Telecasting of Portland, Inc. (ATP) against the captioned renewal application² of Microband Corporation of America (Microband). For the reasons stated below, we grant the Petition and declare that Microband forfeited the license for Multipoint Distribution Service (MDS)³ Station WPY39, Portland, Oregon. We also direct the dismissal of Microband's renewal application. In addition, we also dismiss as

¹ Petition to Deny filed by American Telecasting of Portland, Inc. (filed Dec. 20, 2001) (Petition).

² File No. 20010402AEM (Microband Renewal Application).

³ On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing MDS and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Once the new rules become effective, we will no longer refer to these services as MDS and ITFS.

moot a petition to deny⁴ filed by Microband against the captioned application⁵ filed by ATP to operate on the same channel for which Station WPY39 is licensed.

II. INTRODUCTION

2. The license for Station WPY39 was originally granted on January 12, 1978.⁶ On April 2, 2001, Microband filed an application for renewal of the license for Station WPY39.⁷ On December 20, 2001, ATP filed a petition to deny the pending renewal application.⁸ ATP is the Basic Trading Area (BTA) authorization holder for Portland, Oregon BTA (B358). Microband opposed the petition to deny on January 14, 2002,⁹ and ATP replied on January 23, 2002.¹⁰

3. ATP alleges in its Petition that Microband's license for Station WPY39 has automatically cancelled pursuant to Sections 21.44(a)(3) and 21.303(d) of the Commission's Rules because Microband had not operated the station for a number of years after filing a certification of construction.¹¹ In support of its argument, ATP provides declarations from various technicians stating that WPY39 has not been operational essentially since sometime in 1997, specifically noting signal tests performed in September 1997, December 1997, November 1998, March 1999, August 1999, and December 2001.¹² These declarations additionally attest to the failure of WPY39's test generator in early 1997, the dismantling and removal of the station's equipment since October 1998, and the station lacking an uplink to provide programming as well as several interconnections missing as recently as September 1999.¹³ ATP states that a search of Commission records fails to disclose any annual reports filed for WPY39 since 1997.¹⁴ ATP further alleges that Microband failed to seek or obtain Commission approval for the assignment of WPY39's license to the debtor-in-possession within 30 days after Microband declared bankruptcy in 1989, nor was an assignment application filed or granted when the United States Bankruptcy Court for the Southern District of New York authorized the sale of WPY39's license to J. Patrick Dugan, Microband's President and CEO, in 1994.¹⁵ These failures, ATP states, violate Section 310(d) of the Communications Act of 1934, as amended,¹⁶ and Section 21.38(a) and (d) of the Commission's Rules.¹⁷ In addition, ATP

⁴ Petition to Deny filed by Microband Corporation (filed Apr. 26, 2000) (Microband Petition).

⁵ File No. 20000104AAG (ATP Application).

⁶ See File No. BPMD-7203226 (granted Jan. 12, 1978).

⁷ Microband Renewal Application.

⁸ See Petition, *supra*.

⁹ See Opposition to Petition to Deny filed by Microband Corporation of America (filed Jan. 14, 2002) (Opposition). This filing followed a Motion for Extension of Time filed by Microband on January 4, 2002. We grant the Motion for Extension of Time and consider the arguments made in the Opposition.

¹⁰ See Reply to Opposition to Petition to Deny filed by American Telecasting of Portland, Inc. (filed Jan. 23, 2002) (Reply).

¹¹ Petition at 7; see also 47 C.F.R. §§21.44(a)(3), 21.303(d).

¹² Petition, Declaration of Dennis R. Brooks (Exhibit A) and Further Declaration of Dennis R. Brooks (Exhibit B).

¹³ *Id.* Petition, Declarations of Michael Tondreau (Exhibit C), and Larry R. Wilson (Exhibit D).

¹⁴ Petition at 9 n.15. Section 21.911(a)(3) of the Commission's Rules, 47 C.F.R. § 21.911(a)(3), requires MDS licensees to file annual reports for each station listing, *inter alia*, the number of subscribers and the total hours of transmission service rendered during the calendar year in the following categories: entertainment, education and training, public service, data transmission, and other services.

¹⁵ Petition at 3, 10.

¹⁶ 47 U.S.C. § 310(d).

argues that the latter failure has resulted in the license for WPY39 being held by a corporation that has ceased to exist, because the State of Delaware officially dissolved Microband as a corporate entity on March 1, 1995, the day after Mr. Dugan resigned as President of Microband.¹⁸ ATP notes that the Bankruptcy Court granted Microband's motion to convert its Chapter 11 reorganization to a Chapter 7 liquidation on June 22, 1995, and the dissolution was completed and the proceeding before the Bankruptcy Court was closed on September 4, 1996.¹⁹ ATP contends that subsequent filings by Mr. Dugan reflect both Microband's dissolution, as well as Mr. Dugan's nebulous authority to act on behalf of Microband.²⁰

4. Microband does not dispute that Station WPY39 has been out of operation during the period in question. It claims that the lack of operation of Station WPY39 has not been deliberate, nor has it been the fault of GRQ Investments, LLC (GRQ), which purchased the airtime lease rights on Station WPY39 from Microband in 1994, subject to Commission approval.²¹ Microband states (1) that GRQ entered into an airtime sublease with a company that subsequently became insolvent; (2) that it sought to negotiate a purchase more than once with ATP's parent corporation, during which negotiations GRQ refrained from implementing a business plan; (3) that GRQ was required to remove its transmitting equipment from the tower upon which GRQ leased space when the tower was sold; and (4) that GRQ's efforts to obtain funding to operate WPY39 or to sublease or transfer its airtime rights have been hampered by ATP's challenges before the Commission.²² Microband notes that GRQ has been able to begin transmitting test color bars, and is exploring business plans for the use of Station WPY39.²³ Microband also asserts that other stations have been conveyed with Commission approval despite the lack of a formal transfer from the pre-bankruptcy company to the Debtor in Possession, and that Microband's representatives were in frequent contact with the Commission and its staff during the years of the bankruptcy proceedings.²⁴ Microband claims that other licenses held by it were transferred with Commission approval as part of the liquidation process.²⁵ Microband states that transmitting equipment was not removed from the tower in question but rather disconnected, and that GRQ has been told that the equipment need not be removed at the present time.²⁶

5. On January 4, 2000, ATP filed the ATP Application, which sought authority to operate a new MDS station on Channel 1 at Portland, Oregon.²⁷ The application was accepted for filing on March 27, 2000.²⁸ Microband filed a petition to deny on April 26, 2000.²⁹

¹⁷ 47 C.F.R. § 21.38(a), (d).

¹⁸ Petition at 3-4, 10.

¹⁹ Petition at 4.

²⁰ Petition at 11.

²¹ Opposition at 1.

²² Opposition at 1-3.

²³ Opposition at 3-4.

²⁴ Opposition at 4.

²⁵ Opposition at 4.

²⁶ Opposition at 6.

²⁷ ATP Application.

²⁸ Mass Media Bureau Multipoint Distribution Service Applications Accepted for Filing, Report No. 93, *Public Notice* (rel. Mar. 27, 2000).

III. DISCUSSION

6. *Microband Renewal Application/ATP Petition.* Based on the record before us, we conclude that we need not address whether Microband's license forfeited automatically pursuant to Section 21.44(a)(3) of the Commission's Rules,³⁰ as ATP alleges.³¹ Rather, we find that this issue need not be addressed since the record clearly establishes that Microband permanently discontinued operation of Station WPY39. As a result, pursuant to Section 21.303(d) of the Commission's Rules, the circumstances presented require a determination that the license for Station WPY39 has been forfeited.³² Section 21.303(d) states, in pertinent part:

If any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed . . . the licensee shall, within thirty days of the end of such period of nonuse: (1) Submit for cancellation the station license . . . (2) File an application for modification of the license (or licenses) to delete the unused frequency (or frequencies), or (3) Request waiver of this rule and demonstrate either that the frequency will be used . . . within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse³³

Microband does not dispute that neither Microband nor GRQ have been providing service over WPY39 since at least 1997, if not earlier.³⁴ Section 21.303(d) was designed to ensure that "a carrier who has a license, but is unable to use it . . . relinquish[es] the frequencies to others who may be able to use the spectrum."³⁵ This rule requires a licensee to provide service.³⁶ Therefore, we find that, under the circumstances of this case, pursuant to Section 21.303(d) of the Commission's Rules,³⁷ the license for Station WPY39 has cancelled as of March 1, 1998, the approximate ending date of the twelve-month period following demonstration by the evidence before us of non-service by the station.³⁸

7. We note Microband's arguments that the failure to provide service over Station WPY39 was not its fault, but we determine that those arguments are irrelevant. Nothing in the language of Section 21.303(d) excuses a licensee from complying with the terms of the rule if the failure to provide

²⁹ Microband Petition.

³⁰ 47 C.F.R. § 21.44(a)(3).

³¹ See Petition.

³² 47 C.F.R. § 21.303(d).

³³ *Id.*

³⁴ The last annual report found on file for WPY39, for the year 1994, states that no service was rendered to subscribers that year over WPY39. Microband Corporation of America and Affiliated Companies MDS Licensees' Annual Report – 1994 (filed Feb. 27, 1995).

³⁵ See Revision of Part 21 of the Commission's Rules, CC Docket No. 86-128, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 81 (1987).

³⁶ See San Diego MDS Company, *Order on Reconsideration*, 18 FCC Rcd 23863 (WTB PSPWD 2003) (*application for review pending*); Warren Ache, *Memorandum Opinion and Order*, 9 FCC Rcd 2464, 2466 (1993).

³⁷ 47 C.F.R. § 21.303(d).

³⁸ At this point in time, it is impossible to determine the precise date when the station had been out of operation. According to Michael Tondreau, the station was placed back on the air on January 10, 1997 but went off the air "several weeks later," and was off the air until at least September 1999. Petition, Exhibit C.

service is due to matters beyond its control. If Microband had believed it had good cause for failing to provide service over Station WPY39, it should have filed a request for waiver pursuant to Section 21.303(d)(3). Instead, it did nothing until ATP brought Microband's non-compliance to the Commission's attention. Because Microband failed to request a waiver, we need not decide whether it would have been entitled to a waiver. We conclude that the license must be deemed forfeited.

8. Finally, we note that, contrary to Microband's suggestion, a licensee is expected to file appropriate applications for transfer of control in the context of a bankruptcy proceeding, including transfer to a debtor-in-possession.³⁹ Though Microband claims it has previously transferred licenses during its bankruptcy without first formally transferring them to the debtor-in-possession, and maintained contact with Commission staff during this process, Microband fails to provide specific citations to any Commission approval of this process. Because we conclude that the license for Station WPY39 has been forfeited, we need not address this issue further.⁴⁰

9. *ATP Application.* We dismiss the Microband Petition as moot. On July 29, 2004, the Commission released the *MDS/ITFS R&O & FNPRM* which fundamentally restructured the band to provide MDS and ITFS licensees with greater flexibility, and took numerous steps to promote competition, innovation, and investment in wireless broadband services and educational services.⁴¹ The Commission directed the Wireless Telecommunications Bureau to dismiss all pending applications to modify MDS or ITFS stations (including booster and hub stations), except for modification applications that could change an applicant's PSA, or applications for facilities that would have to be separately applied for under the rules adopted in the *MDS/ITFS R&O & FNPRM*.⁴² Pursuant to that directive, the ATP Application was dismissed on September 20, 2004.⁴³ Accordingly, Microband's petition to deny is moot.

IV. CONCLUSION AND ORDERING CLAUSES

10. For the reasons stated above, we conclude that Microband forfeited its license by failing to use the license to provide service for a period of at least twelve consecutive months. In light of our conclusion that the license for Station WPY39 has forfeited, we will dismiss Microband's application for renewal of license for this station. We also dismiss as moot the Microband Petition.

11. ACCORDINGLY, IT IS ORDERED, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, and Sections 21.30 and 21.303 of the Commission's Rules, 47 C.F.R. §§ 21.30, 21.303, that the petition to deny filed by American Telecasting of Portland, Inc. on December 20, 2001 in connection with Station WPY39 IS GRANTED.

³⁹ See, e.g., *Global Crossing, Ltd. (Debtor-in-Possession), Transferor, and GC Acquisition, Limited Transferee, Order and Authorization*, 18 FCC Rcd 20301 (IB/WTB/WCB 2003); *Wireless Telecommunications Bureau Grants Applications for Assignment of Licenses to WorldCom, Inc. and its Subsidiaries as Debtors in Possession, Public Notice*, 17 FCC Rcd 24530 (2002); *In re Applications of XO Communications, Inc., Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 19212 (IB/WTB/WCB 2002); 47 C.F.R. §§ 1.948, 21.11.

⁴⁰ We also dismiss as moot all other pleadings filed with respect to Station WPY39.

⁴¹ *MDS/ITFS R&O & FNPRM*.

⁴² *Id.*, 19 FCC Rcd at 14191 ¶ 58.

⁴³ See *Wireless Telecommunications Bureau Site-By-Site Action*, Report No. 1947, *Public Notice* (rel. Sep. 29, 2004) at 7.

12. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.303 of the Commission's Rules, 47 C.F.R. § 21.303, that the license for Station WPY39 IS DEEMED FORFEITED as of March 1, 1998.

13. IT IS FURTHER ORDERED that the licensing staff of the Broadband Division SHALL DISMISS the application for renewal of license filed by Microband Corporation of America (File No. BRMD-20010402AEM) on April 2, 2001.

14. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 309, and Section 21.30 of the Commission's Rules, 47 C.F.R. § 21.30, that the Petition to Deny filed by Microband Corporation of America on April 26, 2000 IS DISMISSED AS MOOT.

15. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
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